No. 75-1199

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHRISTIAN J. JANSEN, Jr., PETITIONER

v.

C. MARSHALL DANN,
COMMISSIONER OF PATENTS AND TRADEMARKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
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Department of Justice,
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Petitioner seeks review of a decision of the Court of Customs and Patent Appeals affirming a decision of the Patent and Trademark Office Board of Appeals rejecting his application (No. 57,302) for a patent on a combination of vitamins for use in treating anemia.

Petitioner filed an application for a patent claiming a vitamin preparation which included the two vitamins, vitamin B12 and folic acid, and a method for safely treating anemia with it. Some claims included as little as .1 miligram of each, in approximately a one-to-one ratio. Other claims specified a preparation with at least .5 mg. of vitamin B12 and at least .5 mg. of folic acid. Some claims did not require a set ratio between these two vitamins (Pet. App. A-2).

A patent examiner rejected all claims under 35 U.S.C. 103 because the claims were obvious in light of the state of the art. The Patent and Trademark Office Board of Appeals affirmed on this ground (Pet. App. A-1 to A-7). The Board noted that petitioner had acknowledged that similar dosages of the two vitamins had been individually administered (Pet. App. A-5 to A-6). Moreover, the recommended dosage of two commercially available preparations contained .1 mg. each of vitamin B12 and folic acid (Pet. App. A-7). The Board rejected petitioner's contention that because anemia therapy using vitamin B12 and folic acid in combination was disfavored by some experts, it must be unobvious to formulate such a combination (Pet. App. A-6). The Board denied reconsideration, noting that its determination was based on the prior art, not on differences among practitioners as to the safety and effectiveness of petitioner's method of treating anemia (Pet. App. A-10).

On appeal, the Court of Customs and Patent Appeals affirmed (Pet. App. A-11 to A-17). Noting that use of folic acid alone and vitamin B12 alone, in the amounts claimed, were known treatments for anemia and that preparations containing vitamin B12 and folic acid in a one-to-one ratio are commercially available, the court held that it was obvious "to formulate and use a composition containing both folic acid and vitamin B12 in the recognized individual therapeutic dosages" (Pet. App. A-14).

The court below correctly applied the standard of obviousness under 35 U.S.C. 103 to the particular facts of this case. This essentially factual issue does not warrant further review.

The court found that anemia is often treated with folic acid or vitamin B12 (Pet. App. A-13) and that preparations are commercially available that combine those ingredients in one-to-one ratios, in amounts of .05 mg. each, with two such tablets as the recommended dosage (Pet. App. A-7). Petitioner's proposal to combine at least .1 mg. each of folic acid and vitamin B12 in a one-to-one ratio was therefore plainly obvious.

Petitioner argues here, however, that a controversy existed over the safety of using the ingredients in combination that rendered his proposal nonobvious. But contrary to petitioner's contention (Pet. 13), both the Board of Appeals and the court below examined petitioner's evidence as to safety and found it unpersuasive on the issue of obviousness (Pet. App. A-5 to A-6, A-16).[1] Indeed, a controversy over the safety of the use of the ingredients in combination confirms the finding below that the combination itself is obvious to those reasonably skilled in the art. Cf. *Dann* v. *Johnston*, No. 74-1033, decided March 31, 1976.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[1]Accordingly, there is no question here concerning whether all relevant factors pertaining to obviousness were considered. See *Graham* v. *John Deere Co.*, 383 U.S. 1.